STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED April 23, 1999
v	Nos. 204578;204742;205327 Oakland Circuit Court
ROBERT A. BEATON, Defendant-Appellant.	LC No. 96-148147 FH 96-146729 FH 96-149530 FH

Before: Cavanagh, P.J., and Holbrook, Jr. and Whitbeck, JJ.

PER CURIAM.

Separate juries convicted defendant of three controlled substance crimes in three different trials. However, there was a consolidated sentencing hearing for all three convictions, and this Court consolidated defendant's three appeals. As there are overlapping issues of double jeopardy, sentencing error and other alleged errors, we address the three cases separately and affirm.

I. Basic Facts

A. No 204742: The June 3 Buy

In this case, the jury convicted defendant of delivery of less than fifty grams of cocaine. MCL 333.7401(2)(a)(v); MCL 14.15(7401)(2)(a)(iv). The trial court sentenced defendant as a second major controlled substances offender to two to forty years' imprisonment, consecutive to his sentences for the other two convictions at issue in this consolidated appeal.

At trial, Officer Mark Zupic testified that, in an undercover capacity, he was in Royal Oak at about 10:30 p.m. on June 3, 1996, as he had obtained information that defendant would be in the area of the Backstage night club with cocaine for sale and that he met defendant at that location. According to Officer Zupic, defendant entered the officer's car and produced a small plastic bag that contained an off-white powder and "chunky substance" that Officer Zupic believed was cocaine. Defendant tore the bag open and indicated that both he and Officer Zupic would "do some cocaine," but Officer Zupic declined. Officer Zupic testified that after defendant left the officer's car, Officer Zupic eventually went to a blue Geo Tracker where defendant was in the driver's seat and another white male was in the

passenger seat. Defendant handed a clear plastic baggie to the passenger who wrapped the baggie in a piece of paper and handed it to Officer Zupic. Officer Zupic gave the passenger $500 in cash (the "June 3 buy"). Officer Zupic described the baggie as the same baggie that defendant had previously opened when he was in the officer's car and testified that he recognized the baggie because its top was ripped off. The baggie contained an off-white "powder and lumpy substance" that Officer Zupic believed to be cocaine.[1]

B. No 204578: The June 6 Arrest

The trial in this case was held before a visiting judge. The jury convicted defendant of possession with intent to deliver less than fifty grams of cocaine. MCL 333.7401(2)(a)(iv); MSA 14.15(7401)(2)(a)(iv). Another visiting judge sentenced defendant to two to forty years' imprisonment, consecutive to his sentences for the other two convictions at issue in this consolidated appeal.

At trial, Detective Sergeant Terry Richardson testified that on June 6, 1996, he was in the area of 8 Mile and Southfield Road anticipating defendant's arrival at a Burger King. According to Detective Richardson, from an undercover vehicle parked on a side street he observed defendant and a passenger arrive at the Burger King in a Geo Tracker; Detective Moilanen substantially corroborated Detective Richardson's testimony with respect to observing defendant at the Burger King.

According to Detective Richardson, the Geo Tracker pulled into a parking spot at the Burger King and eventually left that spot and began to head for an exit, onto the public street. However, a marked Southfield police car stopped the Geo Tracker and Detective Richardson arrested defendant for a prior narcotics delivery (the "June 6 arrest"). Detective Richardson testified that he searched defendant and found a clear plastic baggie in defendant's left front pants pocket that contained another plastic baggie that, in turn, contained a white powdery substance. Defendant Richardson also testified that he found $495 in cash. Detective Moilanen testified that he searched defendant's vehicle and found a cellular telephone, a pager and a small film canister that contained "rocks" of suspected crack cocaine.[2] Detective Moilanen estimated that the value of that amount of cocaine would be from $100 to $150, noting that the rocks were much larger than a $20 rock of crack cocaine. He also testified that the approximate value of a gram of powder cocaine is $100.

C. No. 205327: The September 14 Search

In this case, a jury convicted defendant of possession with intent to deliver less than fifty grams of cocaine, MCL 333.7401(2)(a)(iv); MSA 14.15(7401)(2)(a)(iv), based on the discovery of a quantity of cocaine, in a bedroom apparently occupied by defendant, by police during a search on September 14, 1996, at 39072 Polo Club Drive, Apartment 205 in Farmington Hills (the "September 14 search"). The trial court sentenced defendant to four to twenty years' imprisonment for this crime.

At trial, Officer Anthony Tomasi testified that on September 13, 1996, at about 10:30 p.m., he was at the White Castle restaurant at I-96 and Telegraph Road and that he had been requested by Officers James Turner and Adam Pasciak to assist with the surveillance of a vehicle. Officers Turner

and Pasciak were in the same vehicle, Officer Tomasi was by himself in another vehicle and Officer Jason Haas was by himself in a third vehicle.

Officer Pasciak testified that he and Officer Turner had been observing a black Grand Prix. Officer Pasciak said that a gray Ford Thunderbird pulled up next to the Grand Prix, that the driver of the Grand Prix seemed somewhat nervous and that both vehicles then exited the parking lot. The officers followed the two vehicles in their unmarked cars.

Officers Tomasi and Pasciak testified that, along a side street, the two vehicles stopped and the passenger from the gray Thunderbird entered the dark colored Grand Prix. The police later then tried to stop the Grand Prix, its passenger ran away and, eventually, Officer Pasciak found defendant hiding under an evergreen tree in a back yard.

Officer Tomasi testified that he followed the gray Thunderbird and radioed to have a marked police car stop the gray Thunderbird, which the marked police car did. Officer Tomasi searched the gray Thunderbird and found a small "nylon-type" bag on the front passenger seat that contained a teaspoon with a white powder residue that he believed to be cocaine. Officer Tomasi also found a Choreboy scouring pad and a hand-held gram scale. He indicated that, from his training and experience, such a scouring pad was quite often used in smoking crack cocaine. The scouring pad showed a "white-type substance." Officer Tomasi also indicated that he found a "Uno playing card," which he opined was sometimes used with powder cocaine "to make yourself a line to do that cocaine."

Officer Tomasi also testified that there was a cellular telephone on the front passenger seat that he had in his possession for about one and one-half hours. Officer Tomasi indicated that there were about ten incoming calls on the cellular telephone during that time, sometimes the same person calling more than once, asking if "C.C." was there and asking to buy.

Evangelo Alexander Bageris identified defendant and testified that he knew defendant as "Robert" or "C.C." and that he believed that many people called defendant "C.C." Bageris indicated that he knew defendant and Robert Kolpacke as social acquaintances. According to Bageris, on the evening of September 13, 1996, he first saw defendant at Robert Kolpacke's apartment at the Polo Club Apartments in Farmington Hills. Bageris testified that, when he went to that apartment, defendant was there "most of the time." Eventually, Bageris left the apartment with defendant to go to the White Castle "on I-96, Jefferies." Bageris testified that defendant was carrying a bag but that defendant had told him that he did not have "anything" on him, which Bageris indicated that he took as a reference to drugs. Bageris testified that he thought defendant might have drugs on him "[b]ecause he's known for that" and that was how Bageris and defendant knew each other. Bageris also indicated that he and defendant had "partied" together with cocaine, that defendant provided the cocaine and that he sometimes gave defendant money for the cocaine. Bageris said that he had bought cocaine from defendant a day or two before September 13, 1996.

Bageris testified that he was driving a gray Thunderbird that belonged to his parent(s), that at the White Castle defendant asked him to pull up next to a black car and that defendant talked to the person in that car. Bageris testified that he and defendant stayed at the White Castle for a "couple minutes"

and then the person in the black car asked them to follow him. Bageris further testified that they drove out on a service drive and stopped at the light, that defendant "jumped out of the car," that defendant left his bag in the car and that none of the items in the bag belonged to Bageris.

On September 14, 1996, the police executed a search warrant at 39072 Polo Club Drive, Apartment 205. In the south bedroom, Officer Tomasi testified that he found mail addressed to "Robert Beaton" and a duffel bag that contained a jewelry box that in turn contained small "zip-lock" bags. The bag also contained a shoe box that had a package full of "snow seals" or "econo seals" that are used to hold cocaine and two bottles of Inositol, which is used as a cutting agent with cocaine. The bag also contained more mail addressed to defendant, as well as a small amount of loose marijuana. Officer Tomasi testified that one of the bottles of Inositol was empty, while the other was about three-quarters full. Officer Tomasi further testified that a box in the room contained mail and cards addressed to defendant, as well as what may have been a "tally sheet" with names of people and numbers next to those names.

Officer Tomasi also testified that he found a coffee grinder in the bottom cabinet of the entertainment center in the south bedroom. When Officer Tomasi removed the lid of the grinder, he found "quite a bit of white powder" that he believed to be cocaine.[3] Officer Tomasi also found a digital scale on the top shelf of the entertainment center. Inside a closet, Officer Tomasi found "a brown, small bottle that had a clear liquid in it." Officer Tomasi opined that the person who possessed the cocaine in the south bedroom did so with the intent to sell it based on the amount of packaging material found, the Inositol powder which was used "for cutting the cocaine" and the scale.

Officer Turner testified that he searched the area of the apartment between the living room and kitchen. He found a note on a shelf that stated, "Robbie, thanks as always, maybe less cut?" and was signed, "Love, Robbie, Robert, Bob, Bert" [and one other name that was apparently illegible]. Officer Turner testified that he had heard the word "cut" used "to mean an agent used to greaten [sic] a quantity of something such as cocaine."

Officer Jason Haas testified that he was assigned to search the north bedroom of the apartment. In that bedroom, Officer Hass found "Papers of Residency" for Robert Kolpacke. He also found a black plate with visible white powder residue and a cut drinking straw.

Officer Valentino Zavala testified that, in December 1994 and January 1995, he was assigned to the Michigan State Police Down River Area Narcotics Organization. Officer Zavala testified that, on December 5, 1994, he contacted a person via pager and/or telephone about buying narcotics and spoke with that person. According to Officer Zavala, the next day he received a telephone call from the same person, who identified himself as "C.C." Officer Zavala said that he made arrangements to meet "C.C." at a gas station in Southgate, Michigan, to buy cocaine. Eventually, Officer Zavala met defendant at that location. Defendant was in the driver's seat of a white Chevrolet Cavalier and had a female passenger. Defendant indicated to Officer Zavala that he was "C.C." Defendant then directed Officer Zavala to drive Officer Zavala's vehicle with defendant as a passenger to the back of a Ramada Inn a short distance away, which Officer Zavala did. After Officer Zavala parked the car as directed, defendant produced a bag that contained other bags, known as "snow seals, or bindles," that held an

off-white, powdery substance that Officer Zavala believed to be cocaine.[4] Officer Zavala described defendant using a pen, without an ink cartridge, to ingest some of the white powder and offering it to Officer Zavala to do the same. Officer Zavala declined with the excuse that he was "already messed up" and had to drive a long way. Eventually, Officer Zavala asked defendant "how much for the packages," defendant wrote "65" on a newspaper that was inside the vehicle and Officer Zavala then gave defendant $60 in pre-marked Michigan State Police funds, which defendant took without complaint. After placing the money in his pocket, defendant directed Officer Zavala to drive him back to his vehicle. Before exiting the vehicle, defendant encouraged Officer Zavala to call him again. Officer Zavala also indicated that he learned that defendant was living at 20209 Newman in the Brownston area at that time.

Detective Sergeant Tyrone Mitchell, employed with the Michigan State Police, testified that he participated in the execution of a search warrant at 20209 Newman Street in Brownston Township on January 17, 1995 and that he spoke with defendant, who was under arrest at the time, in connection with that search. Detective Mitchell also testified that defendant told him that defendant had been the sole occupant of that residence and that he had some cocaine in the top dresser drawer in his bedroom. Officer Zavala, who acted as the evidence officer during the search, testified that he located about nine and one-half grams of cocaine in a bedroom. Three grams of marijuana were also located in the same bedroom and the "cutting agent" Inositol was located in a kitchen cabinet. Somewhere in the residence, "snow seal paper wafers" and a scale that was "like a gram, ounce scale" were also found. A coffee grinder was also found from which .78 grams of white powder, suspected to be cocaine, was scraped. There were also paper bundles inside a dresser that contained a white powdery substance.

II. Defendant's Claims

A. No. 204742

(1) Prior Bad Acts Evidence

Defendant argues that, in cross-examination by defense counsel, a police officer improperly injected "other acts" evidence regarding an investigation of defendant a month prior to the date of the alleged incident. Further, defendant argues, the prosecution similarly made an improper argument in closing argument by referring to defendant having delivered cocaine a few days earlier.

This issue was not preserved below. This Court ordinarily reviews an unpreserved evidentiary issue for manifest injustice. See, e.g. *In re Snyder*, 223 Mich App 85, 92; 566 NW2d 18 (1997). We conclude that, in light of the overwhelming evidence of guilt, any possible error connected with this issue does not involve manifest injustice warranting a reversal of defendant's conviction.

Defendant's argument is unfocused, but apparently is based on the testimony of Officer Zupic about an earlier drug related transaction that Officer Zupic had with defendant. Prior to this testimony, Officer Zupic testified on cross-examination by defense counsel that he knew defendant was gay. In particular, defense counsel elicited testimony about "Paula" introducing defendant and Officer Zupic at a bar. Defense counsel also asked Officer Zupic if he discussed his "sexual preferences" with defendant

or led defendant on "that you were gay and may be interested in a sexual context [sic] with him," both of which Officer Zupic denied. Apparently as part of a response to this, the prosecution elicited more detailed testimony from Officer Zupic about what occurred at the meeting between defendant, Officer Zupic and "Paula," including testimony to the effect that defendant sold Officer Zupic cocaine on that earlier occasion.

Apparently, defense counsel's motivation for going into this area was to suggest that Officer Zupic unfairly or inappropriately enticed defendant into selling him cocaine by suggesting the possibility of a romantic relationship or sexual contact between the two of them. This testimony was immaterial to the jury trial and should not have been offered by the defense since a claim of entrapment as a bar to prosecution is properly raised by and decided by a trial court as a legal issue with no input from a jury. *People v Patrick*, 178 Mich App 152, 160-161; 443 NW2d 499 (1989). In our view, therefore, while the "other acts" testimony from the prosecution does not appear to have been offered for a proper purpose, the fact that the prosecution was responding to a "defense" outside the province of the jury is a substantial factor weighing against a finding of manifest injustice.

Most importantly, we conclude that any possible error in connection with this issue was harmless beyond a reasonable doubt, given the key testimony from Officer Zupic that defendant and the passenger in his vehicle provided Officer Zupic with a baggie that contained suspected cocaine in connection with the officer giving the passenger $500. Quite obviously, the jury believed this testimony to be truthful in reaching its verdict. We see no reasonable basis on which the testimony at issue would have significantly bolstered the extent to which Officer Zupic appeared credible to the jury. Thus, we find no manifest injustice from the admission of the prior bad acts evidence or the prosecution's argument based on that evidence.

(2) Double Jeopardy

Defendant repeats the same argument that he raises in No. 204578, below. As stated there, defendant's convictions in each of these three consolidated cases did not violate the right against double jeopardy because each conviction was based on a separate and discrete incident or transaction.

(3) Amendment Of The Information

On the first day of trial, the trial court granted the prosecution's motion to amend the information from a charge of possession of less than fifty grams of cocaine with intent to deliver to a charge of actual delivery. Defendant argues that this prejudiced him, violated his rights to due process and was "a profound change requiring an entirely new defense."

We hold that the trial court did not err by granting the prosecution's motion to amend the information. The charge against defendant was based on his alleged participation in selling cocaine to an undercover police officer. Accordingly, he was on notice that he had to defend against such a charge. We conclude that the formal change of the alleged crime from possession of less than fifty grams of cocaine with intent to deliver to the closely analogous crime of actual delivery of less than fifty grams of cocaine did not prejudice defendant. See *People v Weathersby*, 204 Mich App 98, 103-104; 514

NW2d 493 (1994) (no error in amending indictment where the amendment "merely reiterated what was already known to defendant through other procedures" and no new evidence was need to support the amendment). Thus, the trial court did not abuse its discretion by amending the information.

(4) Failure To Excuse Juror

Defendant argues that the trial court should have dismissed one of the jurors for cause. Defendant notes that he sought to have this juror dismissed after exhausting his peremptory challenges, that this juror had "donated a house to a charity auction to be used for a limited time and the [elected county] Prosecutor so used it" and that this juror donated $500 to the Prosecutor's campaign and invited him to a party to meet people.

As will be discussed below, defense trial counsel requested the trial court to remove the juror at issue. While it may be debatable whether this issue is preserved as trial counsel did not state that there were grounds for removal for cause, we treat this issue as being preserved. This Court reviews a trial court's decision on whether to excuse a juror for cause for an abuse of discretion, except where a prospective juror is in a category enumerated by MCR 2.511(D) and must automatically be excused for cause. See *People v Walker*, 162 Mich App 60, 63-64; 412 NW2d 244 (1987).

We conclude that the trial court did not abuse its discretion in refusing to remove the juror for cause. The juror apparently volunteered, at a point after being preliminarily selected for the jury and after defense counsel's ensuing exhaustion of peremptory challenges, that he was in the banking business and that he did substantial entertaining. The juror stated that he had put the use of his property up for a charity auction for a school, freely admitted that he gave $500 to the Prosecutor's campaign and invited the Prosecutor to a Christmas or holiday party.

The mere fact that a potential juror is acquainted with the prosecuting attorney does not warrant an inference of bias. *Walker, supra* at 64. Thus, the fact that the juror invited the Prosecutor to a holiday party was, in our view, not a reasonable basis to excuse that juror for cause. Further, there is no reason to believe that the fact that the Prosecutor prevailed in the auction and therefore spent a weekend at the juror's Lake Tahoe home would prejudice the juror. Indeed, the juror presumably had no way of knowing who would bid the most for this prize at the auction.

With regard to the campaign donation, inasmuch as county Prosecutors are popularly elected, many active members of the community will presumably take sides when there is a serious electoral contest for that position. That a juror has sided with the winning candidate and may even generally support the polices of an incumbent Prosecutor hardly means that the juror will not fairly consider an individual case on its merits, particularly where, as here, the Prosecutor was not directly involved in presenting the case. In our view, it would be unreasonable to conclude that, merely because the juror had made a significant campaign donation to the Prosecutor's campaign, the juror would be prejudiced for the prosecution in this case.

While defendant analogizes this case to *Walker, supra*, we find that case to be inapposite. This Court in *Walker* concluded that a juror should have been excused for cause where that juror was a

police officer who had "worked closely with the prosecutor and certain police witnesses over a course of ten years." *Id.* at 64-65. In *Walker*, "[t]he very nature of this relationship necessarily includes the elements of cooperation and trust in the successful prosecution of criminal defendants." *Id.* at 65. Here, there is no indication that the juror was in any way actively involved with the prosecution in handling criminal cases or otherwise closely connected with the governmental functions of the Prosecutor's office. In sum, the trial court did not abuse its discretion by refusing to excuse this juror.

(5) Hearsay

Defendant notes that Officer Zupic testified that the passenger in defendant's car told him not to be "sketchy" and that the trial court erred by admitting this testimony under the conspiracy exception to the hearsay rule. Defendant preserved this issue by objecting to eliciting of testimony from Officer Zupic about the passenger's statement as constituting inadmissible hearsay. We review this issue for a clear abuse of discretion. *People v Starr*, 457 Mich 490, 494; 577 NW2d 673 (1998).

We find that the testimony at issue did not constitute hearsay, regardless of whether it would fall under the coconspirator exclusion from the definition of hearsay. Officer Zupic testified that the passenger in defendant's car said to him, "Don't be so sketchy next time." While defendant claims that this was inadmissible hearsay, this testimony did not fall under the definition of hearsay *at all* because the statement by the passenger was not assertive in nature. Hearsay, in part, is "offered in evidence to prove the truth of the matter *asserted*" (emphasis supplied). MRE 801(c). The statement was not an assertion, but was rather a request or command to Officer Zupic to not be "sketchy," and is incapable of being considered true or false. *People v Jones (On Reh After Remand)*, 228 Mich App 191, 205; 579 NW2d 82 (1998) (a command that is incapable of being true or false is not hearsay). Thus, defendant has not established any error because the testimony at issue was simply not hearsay.

(6) Evidence Of Flight

Defendant's argument on this issue is virtually incoherent but, in essence, appears to be that the admission of certain testimony from Officer Moilanen about defendant's conduct in driving away from his meeting with Officer Zupic was improper because it did not amount to admissible evidence of flight. Defendant did not preserve this issue below. This Court ordinarily reviews an unpreserved evidentiary issue for manifest injustice. See, e.g. *In re Snyder*, *supra*.

Officer Moilanen testified that he followed the vehicle being driven by defendant after it left the area where defendant met with Officer Zupic. In this regard, Officer Moilanen testified, apparently as evidence of flight, as follows:

> I thought he was going to go south on Woodward. He got all the way over - well, not all the way over, he got in the right center lane, and he looked like he was going to go south on Woodward –
>
> * * *

> [Defendant] pulled in the right center lane, at the light for Woodward. I was in the right lane - well, actually I had to pull along side of him, but I didn't want to, but I pulled along side of him so I could see him again. At that time he went over three lanes of traffic and went north on Woodward, and we decided not to follow him anymore.

While evidence of flight is insufficient to sustain a conviction, it is admissible as some evidence of consciousness of guilt. *People v Coleman*, 210 Mich App 1; 532 NW2d 885 (1995). We conclude that, if there had been an objection on the basis at issue below, the trial court would not have abused its discretion by admitting this evidence because a reasonable juror might have inferred that defendant was concerned that Officer Moilanen was a police officer who observed the drug transaction with Officer Zupic. Thus, the testimony at issue was somewhat probative as evidence of consciousness of guilt.

However, more importantly, we conclude that any possible error with regard to this issue did not amount to manifest injustice, *In re Snyder, supra*, as it was harmless beyond a reasonable doubt. Given that Officer Zupic expressly testified to a transaction in which defendant, with the cooperation of his passenger, provided Officer Zupic with cocaine in return for $500, the testimony at issue was of virtually no significance. Plainly, the jury credited the crucial testimony from Officer Zupic, and we see no reason that the testimony at issue here would have reasonably contributed to that assessment. Thus, we will not disturb defendant's conviction based on this issue.

(7) Alleged Sentencing Errors

Defendant repeats the same argument that he raises in No. 204578, below. For the same basic reasons, we conclude that his sentence was not disproportionately severe. Indeed the two-year minimum sentence in this case might be regarded as lenient, particularly in light of defendant's record of drug crimes. Otherwise, defendant has not established error, except that, as conceded by the prosecution, the case should be remanded for preparation of a sentencing information report.

(8) Vouching For Witnesses

Defendant argues that the prosecutor improperly vouched for the credibility of police testimony in closing argument. This issue was not preserved at trial. This Court's review of unpreserved prosecutorial remarks is precluded unless any prejudicial effect could not be cured by a cautionary instruction or failure to consider the issue would result in a miscarriage of justice. *People v Warren (After Remand)*, 200 Mich App 586, 589; 504 NW2d 907 (1993).

Near the beginning of closing argument, the prosecution stated:

> And there's no reason to doubt the creditability of the Officer's [sic] in this case. In watching you throughout the course of the trial, and watching the witnesses testify in this matter, I don't think any of you do doubt the credibility. There was no reason for Officer Zupic to be dishonest in any way. And he honestly answered the questions, to the best of his ability, throughout the course of the trial.

We conclude that this argument did not constitute improper vouching for the police officers' testimony. The prosecution may not vouch for the credibility of a witness or suggest that the government has special knowledge that a witness is testifying truthfully but may argue from the facts that a witness is credible. *People v Howard*, 226 Mich App 528, 548; 575 NW2d 16 (1997). In this case, soon before the remarks at issue, the prosecution stated to the jurors that they would "judge the credibility of the witnesses." In context, the prosecution was not improperly expressing a mere personal belief in the credibility of Officers Zupic and Moilanen. Rather, in our view, the argument at issue was not improper as, in essence, it was rational argument from the evidence that neither officer had a substantial motive to lie.

Defendant also sets out in isolation the first sentence from the prosecutor's concluding remarks in rebuttal argument:

> *Ladies and gentlemen, there's no doubt that the witnesses in this case were honest.* Any issue with regard to Susan Isley's testimony and the chain of evidence, if you take a look at the Exhibits, the chain of evidence in this case is (inaudible - coughing interrupts speaker), the Officers, as well as Lab, made every attempt to mark down every time the substance changed hands. The fact that it sat there for a couple of months - sometimes it sits there for years - it doesn't change the fact that it is still cocaine. And, in fact, it was the cocaine that was exchanged hands on June 3rd, of 1996. Ladies and gentlemen, please don't get distracted by side-issues, by reasons, by motives, focus on the elements of the crime, and ask yourself whether those have been proven. And I ask you for a verdict of guilty. Thank you. [Emphasis supplied].

In context, the emphasized remark did not constitute vouching for the credibility of witnesses, but rather was merely an introduction to ensuing rational argument about the credibility of a prosecution witness and the strength of the prosecution's case. In sum, we will not reverse defendant's conviction based on this issue as he has not established any improper argument by the prosecution.

(9) Ineffective Assistance Of Counsel

Once again, defendant's argument is more than a little incoherent, but he apparently is suggesting that trial defense counsel provided ineffective assistance of counsel by failing to object or move for a mistrial based on previous unpreserved issues. Obviously, defendant did not preserve this issue below. Reversal based on ineffective assistance of counsel s not justified unless, in part, defendant shows a reasonable probability that, but for the alleged unprofessional conduct by trial counsel, the result of the proceeding would have been different. *People v Pickens*, 446 Mich 298, 312; 521 NW2d 797 (1994).

Here, the unopposed testimony from Officer Zupic was that defendant, with the participation of another person, sold Officer Zupic cocaine. In our view, there is no reasonable basis to conclude that there is a reasonable possibility, let alone a reasonable *probability*, *Pickens, supra*, that differing performance by trial counsel with regard to any of the previous issues would have resulted in the jury

disbelieving this critical testimony. Thus, in light of the overwhelming evidence of guilt, defendant has not established that his conviction should be reversed based on ineffective assistance of counsel.

(10) Restitution

Defendant argues that he was improperly ordered to pay $500 in restitution without a hearing regarding his ability to pay. We hold that a sentencing court is not required to conduct a separate hearing or make express findings of fact regarding a defendant's ability to pay absent a timely objection by the defendant. *People v Grant*, 455 Mich 221, 244; 565 NW2d 389 (1997). Because there was no such objection below, we will not disturb the portion of defendant's sentence requiring him to pay restitution based on this issue.

(11) Sentencing Entrapment

Defendant repeats the same argument of "sentencing entrapment" that he presents in No. 204578, below. This argument makes no sense *whatever* in connection with this particular case. Defendant claims that he was unfairly prejudiced by being allowed to commit more drug related crimes due to the delay in his arrest *after* June 3. However, the crime at issue in this particular case was the transaction that occurred *on* June 3. Thus, the prejudice claimed by defendant was immaterial to his crime on June 3, that occurred *before* the allegedly improper delay.

(12) Conclusion

We affirm defendant's conviction of delivery of less than fifty grams of cocaine. We also affirm his sentence for this crime, but remand the case for preparation of a sentencing information report by the trial court.

B. No 204578

(1) Sentencing Entrapment

Defendant argues that the police engaged in a form of entrapment by not arresting him for the June 3 buy. Basically, he claims that the conduct of the police "escalated" the number of crimes for which he was convicted because if he had been arrested on June 3, then he would not have committed the crime at issue in this particular appeal.

In considering whether improper entrapment has occurred, a trial court must consider whether the police committed (1) impermissible conduct that "would induce a law-abiding person to commit a crime in similar circumstances" or (2) "engaged in conduct so reprehensible that it cannot be tolerated." *People v Ealy*, 222 Mich App 508, 510; 564 NW2d 168 (1997). Entrapment does not occur if "the police do nothing more than present the defendant with the opportunity to commit the crime of which he was convicted." *Id.*

In *Ealy, supra* at 509, the defendant was convicted of three separate delivery of cocaine crimes--and sentenced to three consecutive prison terms for those crimes--based on a series of five

cocaine sales made to an undercover police officer. The initial sale involved one-half of a gram of cocaine, while the final sale involved 250 grams. *Id.* The police officer testified that he bought larger amounts of cocaine from the defendant to determine how much he could deliver and to find defendant's source. *Id.* This Court rejected the defendant's claim of "sentencing entrapment" based on the police continuing the transactions which exposed him to greater penalties:

> In this case, the police did nothing more than present defendant with the opportunity to commit the crimes of which he was convicted.
>
> * * *
>
> There is no evidence that the police continued the purchases merely to enhance defendant's eventual sentence. The undercover officer testified that he purchased greater amounts of cocaine from defendant in order to determine defendant's selling capabilities and to discover the identity of defendant's supplier. Although defendant could have been arrested after any of the earlier transactions, the delay in his arrest was justified on the ground that an earlier arrest would have impaired the ability of the police to conduct an ongoing undercover narcotics investigation. See *People v Betancourt*, 120 Mich App 58, 62; 327 NW2d 390 (1982). See also *United States v Calva*, 979 F2d 119, 123 (CA 8, 1992) (police … must be given leeway to probe the depth and extent of a criminal enterprise, to determine whether coconspirators exist, and to trace the drug deeper into the distribution hierarchy). The trial court did not clearly err in determining that there was no sentencing entrapment in this case. [*Ealy, supra* at 511-512.]

Here, the delay by the police in arresting defendant after the June 3 buy was far less substantial than in *Ealy* in that it did not involve a repeated pattern of cocaine sales to an undercover police officer. Further, Detective Moilanen testified that he had been following defendant on June 3 to find his supplier "the next level up" and that this was a common practice. Thus, we conclude that defendant has not established any improper sentencing entrapment and we will not disturb his conviction based on this issue.

(2) Right Of Confrontation

Defendant argues that he was deprived of his right to cross-examine Detective Moilanen to show that the alleged inability to find defendant between June 3 and 6, 1996, was a pretext. Implicit in defendant's argument is that it was for the jury to determine whether the police made adequate efforts to find defendant between June 3 and 6 and, thereby, whether defendant should be acquitted in this case based on "sentencing entrapment." However, whether entrapment has occurred is a matter to be decided by a trial judge without input from the jury. *Patrick, supra*.

(3) Use Of Police Officer As An Expert

Defendant notes that Detective Moilanen was qualified as an expert in narcotics investigation by the trial court. In this regard, Detective Moilanen testified about finding a cellular telephone, a pager and a small film canister with rocks of crack cocaine, which he described as "definitely" showing an intent to deliver. Detective Zupic provided similar testimony. Defendant argues that the trial court erred by allowing Detective Moilanen to present this improper "profile evidence" as substantive evidence of defendant's guilt. Defendant did not object below to the questions at issue. Thus, this issue is unpreserved. This Court ordinarily reviews an unpreserved evidentiary for manifest injustice. See, e.g. *In re Snyder, supra*.

We find that, even if this issue had been preserved below, the evidence at issue would have been properly admitted as this evidence is not the type of "profile evidence" condemned for use as substantive evidence of guilt in *People v Hubbard*, 209 Mich App 234; 530 NW2d 130 (1995). Thus, we will not disturb defendant's conviction based on this issue.

We note that after defense counsel expressed that he had no objection, the trial court qualified Detective Moilanen as an expert in narcotics enforcement. During direct examination by the prosecution, Detective Moilanen testified that, after defendant was arrested, he searched defendant's vehicle and found a cellular telephone, a pager and a small film canister behind the driver's seat. Detective Moilanen testified that he opened the canister and found about six grams of rocks of suspected crack cocaine. Detective Moilanen opined that this cocaine was "definitely" possessed with the intent to deliver and provided the following explanation:

> You have powder cocaine, approximately six grams or so. You have the crack cocaine, which I believe the weight was a little over a gram, and the way it's - I remember when I opened this up, the rocks were, they were still wet. And a crack user certainly wouldn't cut that up into smaller pieces like they were cut up. There's no crack pipe found with thus stuff, no straws or anything like that to use with the powder cocaine. There was a pager and a cellular phone, which I've done hundreds of deals and I can't remember a deal where I hadn't used my pager or cellular phone.

Officer Zupic similarly testified that, "[b]ased on the totality of all the items that we recovered that night, I believe that this - he was in possession of these narcotics for the sole purpose of delivery."

In *Hubbard, supra* at 238, a police detective testified as an expert witness about "a profile of drug dealers" including personal characteristics and behaviors such as drug dealers being unlikely to use their own vehicles, usually traveling in groups of two to six people, rarely carrying identification, using "street names" and usually carrying large amounts of cash. The prosecution in *Hubbard* referred to this profile evidence as circumstantial evidence of guilt. *Id.* This Court, in reversing the defendant's conviction, disapproved the use of "drug profile evidence" as substantive evidence of guilt. *Id.* at 241. This Court found the reliability of such evidence to be suspect. *Id.* Further, this Court observed:

> We note that such profile evidence often changes to meet the facts of any given case. The broad brush painted by such profiles inevitably will cover many innocent individuals. [*Id.* at 242.]

However, the *Hubbard* panel also noted that "courts generally have allowed expert testimony explaining the significance of seized contraband or other items of personal property." *Id.* at 239.

The testimony here was not to the effect that a person was likely to be a drug dealer based on that person having certain personal characteristics that the police associated with drug dealers. Rather, the testimony reached a conclusion that the nature of the cocaine seized at the time of the arrest and other seized items of personal property were associated with an intent to distribute. Under *Hubbard*, such testimony is not precluded as profile evidence. Testimony about the significance of the form or packaging of seized illicit drugs or about the finding of other items of personal property such as a cellular telephone or a pager in close proximity to illicit drugs pose a far lesser risk of implicating the innocent than would the broader "drug profile" at issue in *Hubbard*. Accordingly, we conclude that the testimony at issue was not precluded as "drug profile" evidence because it permissibly explained the significance of the seized contraband and other items of personal property. *Hubbard, supra* at 239. Thus, we conclude that defendant has not established that the admission of the testimony at issue was improper, let alone that its admission resulted in manifest injustice.

(4) Alleged Sentencing Errors

(a) Introduction

Defendant makes a number of arguments with respect to alleged sentencing errors. First, he argues that he was entitled to be sentenced by the same judge who presided at trial. He notes that, without record explanation, defendant was sentenced by Judge Meyer Warshawsky rather than by Judge Charles Nelson who presided at trial. Defendant claims that this prejudiced defendant because Judge Nelson was acquainted with all the circumstances attending defendant's conviction.

Second, defendant claims that it is unclear if his consecutive sentences were imposed pursuant to the conspiracy statute. If so, he argues that this was error and claims that the prosecutor incorrectly stated to the trial court that consecutive sentencing was required. We note that it does not appear from the record that a sentencing information report was prepared by the trial court.

Third, defendant argues that his sentence was disproportionate. He claims that he had only a single felony prior to "the current cocaine related crime spree." This does not merit "a minimum of 8 years" and a maximum sentence "subject only to the vagaries of the parole board."

Fourth, defendant argues that he should have received credit for time served in jail on all three sentences.

(b) Different Judge At Sentencing

In *People v Robinson*, 203 Mich App 196, 197; 511 NW2d 713 (1993), this Court stated that a defendant is entitled to be sentenced before a judge who accepts a plea provided that the judge is reasonably available, but that the defendant waived that right at the time of the plea and, thus, resentencing was not required. In *Robinson*, defendant was informed that he would be sentenced by the assigned judge who was unavailable at the time of the plea proceeding, and defendant and his counsel indicated that they were aware of this and did not object. *Id.* at 197-198. While the case here involved a jury trial and not a plea proceeding, we conclude that the same basic principle applies: a defendant waives any possible error in being sentenced by a different judge than the one who presided at the time of conviction if the defendant fails to object below. Here, we have found no indication in the record that defendant at or prior to the sentencing proceeding objected to being sentenced by Judge Warshawsky. Thus, we conclude that defendant waived any possible error in being sentenced by Judge Warshawsky, rather than Judge Nelson, and is not entitled to resentencing based on this claim of error.

(c) Consecutive Sentencing -"Conspiracy" Argument

Defendant indicates that it is unclear whether the consecutive sentences imposed in this case and the two other consolidated cases were "imposed pursuant to the Controlled Substance Act or the conspiracy statute" and that if consecutive sentencing was based on the conspiracy statute that this was error. This argument makes no sense whatever; *none* of the three convictions in these consolidated cases were for conspiracy. Rather, two of the convictions were for possession of an amount of cocaine with intent to distribute, while the other was for delivery of cocaine. As we outline below, consecutive sentences for these crimes was required by the plain language of MCL 333.7401(3); MSA 14.15(7401)(3).

We further note that the only case cited by defendant in the pertinent part of the argument section of his brief, *People v Denio*, 214 Mich App 647; 543 NW2d 66 (1995), rev'd 454 Mich 691 (1997), was reversed by the Michigan Supreme Court prior to the filing of defendant's brief and further would have been inapposite in any event as it involved the question of whether the consecutive sentencing provision of MCL 333.7401(3); MSA 14.15(7401)(3) applies to conviction of *conspiracy* to commit a controlled substance enumerated in MCL 333.7401; MSA 14.15(7401).

(d) Consecutive Sentencing - "Pending" Case Argument

We find that, contrary to defendant's argument, the sentences in each of the three consolidated cases were *required* by statute to be consecutive. MCL 333.7401(3); MSA 14.15(7401)(3) provides in pertinent part, "A term of imprisonment imposed pursuant to subsection (2)(a) or section 7403(2)(a)(i), (ii), (iii), or (iv) [this encompasses all three of defendant's convictions in the consolidated cases] shall be imposed to run consecutively with any term of imprisonment imposed for the commission of another felony." Thus, pursuant to the plain language of § 7401(3), the three sentences of terms of imprisonment in these consolidated cases for felony drug crimes were required to be imposed consecutive to each other. See, e.g. *People v Denio*, 454 Mich 691, 701; 564 NW2d 13 (1997). Defendant's argument in this regard is entirely lacking in merit.

(e) Failure to Complete A Sentencing Information Report

While the sentencing guidelines were inapplicable to defendant's sentencing for a second major controlled substances crime, under controlling precedent, we must remand this case for the administrative task of preparing a sentencing information report. *People v Yeoman,* 218 Mich App 406, 423 & n, 6; 554 NW2d 577 (1996).

(f) Sentencing Proportionality

As an initial matter, defendant incorrectly indicates that the consecutive nature of his sentences may be taken into account in reviewing their proportionality. On the contrary, each sentence is to be reviewed separately for whether it is proportionate, without regard to its consecutive nature. *People v Miles,* 454 Mich 90, 95; 559 NW2d 299 (1997).

We note that the case cited by defendant for the proposition that the consecutive nature of sentences may be taken into account in reviewing their proportionality, *People v Davis*, 196 Mich App 597 (1992), was expressly overruled on that point by the Michigan Supreme Court in *Miles, supra* at 95, over one year before the filing of defendant's brief.

Here, defendant was convicted of possession with intent to deliver under fifty grams of cocaine, MCL 333.7401(2)(a)(iv); MSA 14.15(7401)(2)(a)(iv). Generally, this crime is punishable by imprisonment for not less than one, or more than twenty, years, a fine of up to $25,000 or probation for life. *Id.* However, because defendant was being sentenced as one convicted of a second major controlled substances crime, the trial court had discretion to impose a sentence up to twice that otherwise authorized. MCL 333.7413(2); MSA 14.15(7413)(2). Defendant's sentence of two to forty years' imprisonment reflects only a doubling of the minimum prison term generally provided for this crime. The presentence report reflects that defendant had a prior conviction for delivery of less than fifty grams of cocaine.

Further, the circumstances of these consolidated cases reflect three separate incidents in which defendant was involved with cocaine trafficking. Against this background of repeated criminal behavior, we conclude that there is no reasonable claim that defendant's sentence is disproportionately severe. "[T]he Legislature … intended more serious commissions of a given crime by persons with a history of criminal behavior to receive harsher sentences than relatively less serious breaches of the same penal statute by first-time offenders." *People v Milbourn,* 435 Mich 630, 635; 461 NW2d 1 (1990). Moreover, the trial court referred to defendant's lack of remorse at the sentencing hearing. However, the trial court also noted that it was "not sentencing [defendant] away for life," and that it believed defendant could be rehabilitated. In short, the trial court reasonably considered both mitigating[5] and aggravating factors in arriving at its sentence.

(g) Sentence Credit

We find that contrary to defendant's position, he was not entitled to credit for time served for each of his consecutive sentences. See *People v Alexander (After Remand),* 207 Mich App 227,

229; 523 NW2d 653 (1994) (sentencing credit to which defendant was entitled was applicable only to his first consecutive sentence).

(5) Prior Bad Acts Evidence

Defendant argues that the trial court improperly admitted evidence of other bad acts, apparently challenging the admission of testimony from Officer Zupic that he purchased cocaine from defendant on June 3. Defendant claims that the prosecution even elicited testimony that defendant had previously been convicted in connection with the June 3 buy. Defendant preserved this issue by objecting to the "other acts" evidence. This Court reviews a trial court's decision as to whether evidence is admissible for a clear abuse of discretion. *Starr, supra*.

We find that, while part of the testimony at issue was improperly admitted, the error was harmless. While phrasing his argument somewhat awkwardly, defendant basically attacks the admission of testimony from police officers about the June 3 buy as improper propensity evidence barred by MRE 404(b)(1), which provides:

> Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, scheme, plan, or system in doing an act, knowledge, identity, or absence of mistake or accident when the same is material, whether such other crimes, wrongs, or acts are contemporaneous with, or prior or subsequent to the conduct at issue in the case.

"Other acts" evidence is not barred by MRE 404 if it is relevant on any noncharacter theory. See *People v VanderVliet*, 444 Mich 52, 62-63; 508 NW2d 114 (1993), modified on other grounds 445 Mich 1205 (1994). However, evidence that is not barred by MRE 404(b) may nevertheless be excluded by the trial court under MRE 403 if its probative value is substantially outweighed by the danger of undue prejudice. *VanderVliet*, *supra* at 74-75.

Here, Officer Zupic testified about the June 3 buy of half an ounce of cocaine from defendant for $500. We conclude that the trial court did not abuse its discretion in admitting this testimony. Apart from general conclusions regarding defendant's character, this testimony may reasonably be considered as evidence that defendant was at the time engaged in a scheme or plan of possessing cocaine with the intent to deliver it. This was highly probative as evidence that defendant possessed the cocaine at issue with the intent to deliver it.

However, Officer Zupic also, in essence, replied affirmatively when the prosecution asked him if defendant had been "convicted of the delivery of June 3rd."[6] We conclude that this testimony was improperly elicited. While the facts surrounding the June 3 buy were admissible evidence, the fact that defendant was convicted of a crime based on that incident simply had no legal relevance. Any findings by another jury that tried the case based on alleged criminal activity during the June 3 buy obviously were not binding on the jury in the present case. In our view, it was improper for the prosecution to ask--and the trial court to allow--this questioning.

Nevertheless, we conclude that this error does not require reversal of defendant's convictions. Unopposed testimony from Detective Richardson indicated that cocaine and $495 in cash were found on defendant's person and that more cocaine and items of property heavily associated with drug dealing were found behind the driver's seat in the vehicle that defendant had been driving. Even without the reference to defendant's other conviction, the unopposed testimony of the police officers about the June 6 arrest provided overwhelming evidence of defendant's guilt. Thus, we conclude that, under the standard for nonconstitutional[7] error in a criminal case, the erroneous admission of testimony about defendant's prior conviction does not require reversal because it is "highly probable" that it did not contribute to the verdict. *People v Mitchell (On Remand)*, 231 Mich App 335, 339; __ NW2d ___ (1998). In sum, we will not disturb defendant's conviction based on this issue.

(6) Ineffective Assistance Of Counsel

Defendant argues that he did not receive effective assistance of counsel when trial counsel failed to move for a mistrial or correct "the errors herein mentioned." Obviously, defendant did not preserve this issue below. Reversal based on ineffective assistance is not justified unless, in part, defendant shows a reasonable probability that, but for the alleged unprofessional conduct by trial counsel, the result of the proceeding would have been different. *Pickens, supra*.

We find that defendant has not established that he received ineffective assistance of counsel. Defendant has not argued specific areas where trial defense counsel failed to provide effective assistance, but rather asserts a vague, generalized claim of ineffective assistance. We conclude that defendant abandoned this issue by failing to seriously argue its merits. See, e.g. *People v Jones (On Reh)*, 201 Mich App 449, 456-457; 506 NW2d 542 (1993). Further, in light of the overwhelming evidence of guilt, we conclude that there is no reasonable probability, *Pickens, supra*, that different conduct by trial counsel would have resulted in a different verdict.

(7) Double Jeopardy

Defendant argues that his conviction of three separate crimes in three separate trials for the related charges in these cases violated the right to be free from double jeopardy. We find that this argument is without merit. As is evident from even a surface review of the basic facts of these three cases, the allegations underlying each of defendant's convictions involved distinct incidents at different times and locations. There was no double jeopardy violation. See *People v Toby*, 401 Mich 141, 149; 257 NW2d 537 (1977) (each incident of selling heroin to same person on different days constituted a separate act and transaction and, thus, a separate and distinct crime that could be prosecuted separately for double jeopardy purposes.)

(8) Transcription Of Voir Dire Proceedings

Defendant argues that he should have been provided with a transcript of the voir dire so that appellate defense counsel could have reviewed it for possible issues to raise on appeal. Pursuant to *People v Bass (On Reh)*, 223 Mich App 241, 260; 565 NW2d 897 (1997), if the defendant is indigent, the defense is entitled to a transcript of the jury voir dire because appellate defense counsel

was not defendant's trial counsel.[8] However, given that the defense has not sought to file a supplemental brief presenting issues based on that transcript or otherwise raise issues based on the jury voir dire, we believe it is appropriate to conclude that defendant has no issues to raise in that regard and, thus, that this issue does not involve error requiring reversal.

(9) Restitution

Defendant argues that he was deprived of his Fifth Amendment rights of due process when restitution was ordered. We find that this issue is not sensibly raised in this particular appeal. At the sentencing hearing, defendant was ordered to pay restitution in connection with one of his other convictions, not the conviction at issue in this appeal.

(10) Conclusion

We affirm defendant's conviction of possession with intent to deliver less than fifty grams of cocaine. We also affirm his sentence for this crime, but remand the case for preparation of a sentencing information report by the trial court.

C. No. 205327

(1) Hearsay Evidence

Defendant argues that the testimony concerning calls to the telephone "found in the searched apartment" during the September 14 search was inadmissible hearsay. Defendant claims that allowing this testimony to be presented to the jury virtually assured conviction without directly referencing whether defendant was guilty of the charged crime. Defendant preserved this issue by objecting to the testimony about statements by callers over the cellular telephone as hearsay. This Court reviews a trial court's decision whether evidence is admissible for a clear abuse of discretion. *Starr, supra*.

We find that the testimony at issue was not hearsay. Officer Tomasi testified that callers on the cellular telephone asked whether "C.C." was there and asked to buy cocaine. As discussed above in No. 204742, speech that is not an assertion does not constitute hearsay. See MRE 801(c); *Jones, supra* at 205 (a command incapable of being true or false is not hearsay). The inquiries of the callers asking if "C.C." was there were not assertions, as these inquiries could not be considered true or false. Similarly, the requests to buy cocaine were not assertions as they could not be categorized as true or false. While one might argue that the latter requests were implicit assertions that the callers wanted to buy cocaine, such an "implied assertion" does not constitute hearsay. *Id.* at 223-224.[9]

(2) Unreasonable Search And Seizure

Defendant argues that the police provided an inadequate explanation to justify the stop of the vehicle in which defendant was riding. Defendant also claims that the police went to a home "in Trenton/Brownstown" to conduct surveillance on defendant and improperly seized and examined his trash, finding incriminating evidence.

We hold that defendant's position on this issue is directly contrary to controlling case law that he fails even to acknowledge. First, it is not clear whether defendant objects to the police stopping, or attempting to stop, both the Thunderbird driven by Bageris and the Grand Prix driven by another person or only one of those stops. However, it is evident that neither of those vehicles was owned or driven by defendant or even used by defendant for any extended period. Thus, defendant had no standing to challenge the police stopping the cars as he had no reasonable expectation of privacy with regard to either car. *Rakas v Illinois*, 439 US 128, 134; 99 S Ct 421; 58 L Ed 2d 387 (1978) (passengers in car they neither owned or leased lacked a reasonable expectation of privacy); see also *People v Kramer*, 108 Mich App 240, 247; 310 NW2d 347 (1981).

Further, warrantless search and seizure of trash left at the curb of a private residence does not violate the Fourth Amendment "because society is not prepared to recognize the resident's expectation of privacy in the trash bags as objectively reasonable." *In re Forfeiture of $10,780*, 181 Mich App 761, 764-765; 450 NW2d 93 (1989).

(3) Prior Bad Acts Evidence

Defendant argues that the trial court improperly admitted "other acts" evidence related to defendant's involvement with cocaine dealing in 1994 and 1995. We hold that the trial court did not abuse its discretion by admitting the testimony at issue.

MRE 404(b)(1) provides:

> Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, scheme, plan, or system in doing an act, knowledge, identity, or absence of mistake or accident when the same is material, whether such other crimes, wrongs, or acts are contemporaneous with, or prior or subsequent to the conduct at issue in the case.

Such "other acts" evidence is not barred by MRE 404 if it is relevant on any noncharacter theory. See *VanderVliet*, *supra* at 62-63. However, evidence that is not barred by MRE 404(b) may nevertheless be excluded by the trial court under MRE 403 if its probative value is substantially outweighed by the danger of undue prejudice. *VanderVliet*, *supra* at 74-75.

Defendant's argument is unfocused, but in essence appears to be an attack on the admission of testimony from Officer Zavala and Detective Mitchell related to the circumstances underlying previous cocaine dealing by defendant in 1994-1995. We find that aspects of Officer Zavala's testimony about defendant's conduct during the prior drug dealing and items found during the search of the bedroom used by defendant in January 1995 explain defendant's intent with regard to his possession of the cocaine at issue in this case apart from a naked propensity theory. Officer Zavala testified about defendant having him drive from their initial meeting place to another location for the transaction to occur. This testimony explains why the Thunderbird in which defendant was riding may have initially

pulled up next to the Grand Prix at the White Castle, but then drove to another location where defendant left the Thunderbird and entered the Grand Prix. That defendant was engaged in such conduct, arguably associated with drug dealing and similar to his past drug dealing practices, could reasonably be considered as relevant to the intent with which he possessed the cocaine at issue found in the south bedroom of the apartment in Farmington Hills.

Further, Officer Zavala testified about finding the cutting agent Inositol, a scale, "snow seals" and other such items in the January 17, 1995 search, while police officers testified that similar items were found in the September 14 search. Coupled with Officer Zavala's testimony that defendant sold him cocaine near the time of the earlier search and Detective Mitchell's testimony that defendant said he possessed cocaine in the bedroom at the time of the earlier search, we conclude that this testimony was indicative of defendant's intent in possessing the cocaine at issue here. The testimony showed defendant as having been in possession of items that he had a practice of using to process and package cocaine. While this testimony of prior cocaine dealing was certainly quite prejudicial in light of the danger of its use on an inappropriate propensity theory, one could reasonably conclude that this danger did not substantially outweigh its legitimate probative value. Thus, we conclude that the trial court did not abuse its discretion by admitting the testimony.

(4) Defense Witness

Defendant notes that at trial defense counsel sought to call defendant's sister Margaret Tarr to show that defendant resided somewhere other than where the narcotics were found. The prosecution objected, noting that no advance notice of the witness had been supplied pursuant to its demand for discovery. Defendant argues that the trial court's exclusion of Tarr as a witness improperly prejudiced the determination of defendant's guilt or innocence. Defendant did not preserve this issue by timely objection below. This Court reviews a trial court's decision regarding the appropriate remedy for noncompliance with a discovery order for an abuse of discretion. *People v Davie (After Remand)*, 225 Mich App 592, 597-598; 571 NW2d 229 (1997).

We conclude that the trial court did not abuse its discretion by precluding defendant from calling his sister as a witness based on his failure to provide notice of his intent to call her. We first note that on the morning of the first day of trial (the day when, among other things, the jury was impaneled although no trial testimony was taken), there was a discussion among counsel and the trial court before the jury was selected regarding whether the defense should be allowed to call Tarr. Apparently, it is undisputed that defendant failed to provide the required notice regarding this witness. Thus, the only issue is whether the trial court abused its discretion by precluding defendant from calling Tarr to testify at all.

The trial court initially directed Tarr to make herself available to the prosecutor for interview purposes during the "noon hour" break before the trial court would rule on whether she would be allowed to testify. In the afternoon of the first day of trial, the prosecutor requested that the trial court bar testimony from Tarr:

> I had the opportunity to speak with the Defense Counsel's potential witness, Judge, and I do feel it would be unfair, at this time, having to proceed with the surprise of this

> witness for a couple reasons. Based on my conversations with this witness, Judge, and the information that she told me, I have no way, at this late hour, to verify her information. She indicated several things to me that seem incredible. Such as the fact that the Defendant lived with her and that she saw him everyday, give or take one or two days; and that he was always there at the apartment where they lived. Judge, had I known about this witness sooner, I would have had more than enough time to have Officers go out and interview neighbors in that apartment complex to see whether or not they were aware of the Defendant, or ever saw him present in that location. She indicates to me he's not on the lease of that apartment, so there's nothing to verify her statement to me; other than the fact, you know, her word. And it is a bias [sic] witness; it's the Defendant's sister. Had I been given the opportunity prior to today's date to know that she was going to testify, I certainly would have had Officers go out and investigate, and talk to the neighbors in that location.
>
> Judge, the Court rule states that I am to be provided with the information 14 days after I request it. I requested it in January. It is now the end of April. Defense counsel has not shown good cause why he has not given me the name of this witness … before this morning. And I request that you exercise your discretion and disallow this testimony.

The trial court ultimately barred testimony from Tarr stating:

> And all I can tell you, sir, you didn't comply with Discovery. If there's a problem with this that she can't rebut what your witness is going to say, I am compelled to deny your witness's appearance on the stand.

We conclude that the trial court did not abuse its discretion, *Davie*, *supra*, by imposing this sanction. The lack of proper notice that defendant would seek to call Tarr as a witness deprived the prosecution of any real opportunity to investigate her possible testimony. Tarr would apparently have provided highly questionable testimony about defendant living with her, without objective verification. The trial court reasonably precluded such testimony as an appropriate sanction in light of the lack of opportunity for the prosecution to adequately investigate the truthfulness of Tarr's testimony.

(5) Included Offense

Defendant argues that the trial court erred by failing to sua sponte instruct the jury on the necessarily included offense of simple possession of cocaine. We conclude that the trial court had no duty to sua sponte instruct on the lesser necessarily included offense of simple possession of less than fifty grams of cocaine. *People v Till*, 115 Mich App 788, 798; 323 NW2d 14 (1982) (unless a defendant is charged with first-degree murder, the trial court is not required to sua sponte instruct the jury on a lesser included offense).

(6) Use Of Police Officer As An Expert

As he did in No. 204578, defendant argues that the testimony of Officer Tomasi and two other police officers was improper "profile evidence." As we stated above, testimony about the uses of physical objects associated with drug dealing is not the type of "profile evidence" condemned in *Hubbard, supra.* We also conclude that the general testimony that users of cocaine often sell cocaine does not amount to profile evidence.

(7) Irrelevant And Unfair Evidence

Defendant notes that the prosecution introduced a note found on a shelf in the Farmington Hills apartment. Defendant argues that this evidence was unfair because it had an undue tendency to suggest a decision on an emotional basis. Defendant claims that, while of minimal logical relevance, this evidence may have been given weight by a jury substantially out of proportion to its damaging effect and must have had a strikingly emotional impact on the jury "since it virtually confirmed Defendant as a drug dealer." We conclude that this issue is unpreserved. While trial defense counsel objected to the admission of the note at issue, he presented no intelligible basis for the objection. This Court ordinarily reviews an unpreserved evidentiary issue for manifest injustice. *In re Snyder, supra.*

We conclude that defendant has not established that the admission of the note was improper, let alone that its admission resulted in manifest injustice. The note stated, "Robbie, thanks as always, maybe less cut?" and was signed, "Love, Robbie, Robert, Bob, Bert." We hold that this note was relevant under MRE 401 because, coupled with the location of the cutting agent Inositol in a duffel bag with defendant's mail in the south bedroom of the apartment, it had a tendency to make it more probable that defendant was delivering cocaine to others and, thus, that he possessed the cocaine at issue with the intent to deliver it. While the fact that the note was addressed to "Robbie" may have introduced some ambiguity--in that there were indications that both defendant and Robert Kolpacke stayed at the apartment--the location of the Inositol in an area more closely connected with defendant could reasonably be viewed as making it more probable that the note was intended for defendant.

With regard to MRE 403, we recognize that the implicit indication in the note that defendant had delivered illicit drugs previously might present a risk that a juror would vote to convict regardless of what the juror concluded about defendant's intent with regard to the cocaine at issue here. However, in our view, one could reasonably conclude that such a risk did not substantially outweigh the probative value of the evidence in showing defendant's involvement with drug dealing, particularly with respect to the reason that he possessed the cocaine.

(8) Newly Discovered Evidence

Defendant argues that People's Exhibit 2 – cocaine found in a planner seized by the police when defendant was arrested – was improperly admitted as newly discovered evidence. Defendant preserved this issue by objecting to admission of the packets of suspected cocaine based on the lack of notice. This Court reviews a trial court's decision as to whether evidence is admissible for a clear abuse of discretion. *Starr, supra.* Further, we review a trial court's decision regarding the consequences of a failure to provide proper discovery for an abuse of discretion. See, e.g. *Davie, supra* at 597-598.

We conclude that the trial court did not abuse its discretion by admitting the suspected cocaine. Exhibit 2 was actually the planner seized from the Thunderbird driven by Bageris. On the third day of trial, the prosecutor explained:

> Judge, I guess, this Exhibit No. 2 was found in the vehicle of Mr. Bageris. But the Exhibit was briefly opened and closed once there was found identification. Yesterday, or I guess it was Monday, when Defense Counsel was asking us to determine whether or not we were in possession of a Driver's License, Officer Turner went through the Exhibits very thoroughly, and found two packets of cocaine inside the planner.

The prosecutor stated, without contradiction by defense counsel, that "as soon as [she] found out about it, [she] told [defense counsel]." Ultimately, the trial court allowed testimony about finding the packets of suspected cocaine, but would not allow testimony about the positive result for the presence of cocaine in a field test and would not delay the trial to await laboratory testing of the suspected cocaine.

Soon thereafter, Officer Pasciak testified that he recovered Exhibit 2, the planner, from the gray Thunderbird "owned" by Bageris. Officer Pasciak indicated that he went through the car before releasing it to Bageris and kept the planner because in examining it he saw that "C.C. Love" was written on one of its pages and that this was a name by which defendant had gone. Basically, Officer Pasciak secured the planner as an item of evidence without thoroughly searching it. A later, and more thorough, search revealed "a rock-type substance; that is similar in appearance to cocaine."

Here, the gist of defendant's argument is that the trial court abused its discretion by admitting the suspected cocaine because the prosecution had not provided adequate notice. In essence, defendant is alleging a discovery violation, albeit one that was apparently unintentional. It appears undisputed that the prosecution first learned of the existence of the packets of suspected cocaine on the first day of trial. We hold that the trial court did not abuse its discretion, *Davie, supra*, but rather acted reasonably by declining to exclude this evidence based on its late discovery. There is no reason to conclude that the late discovery of the evidence was the result of any intentional wrongdoing; rather its late discovery was due to an arguably incomplete search or examination by one or more police officers. The evidence that defendant possessed drugs at the time he was in the Thunderbird and had contact with the driver of the Grand Prix was probative of defendant's intent in possessing the cocaine at issue here by showing that he was at that time involved in drug dealing. We see no *unfair* prejudice to defendant from the admission of this evidence as we cannot see how further time to prepare for meeting this evidence would have allowed defense counsel to present any plausible innocent explanation for the packets.

(9) Evidence Of Flight

Defendant notes that there was testimony that the vehicle in which defendant was riding "accelerated away from the police" and that, a short time later, defendant jumped from the car and was thereafter pursued and caught by the police. Defendant argues that the probative value of evidence of flight is questionable and that this evidence should not have been admitted. We conclude that, under controlling precedent from this Court, evidence of flight is admissible as some evidence of consciousness of guilt. *Coleman, supra.* Thus, we will not disturb defendant's conviction based on this issue.

(10) Alleged Sentencing Errors

Defendant essentially raises the same type of challenge to his sentence in this case as in the prior two of these three consolidated cases. For the same basic reasons as in the two other cases, we conclude that defendant's sentence should not be disturbed. Indeed, we again observe that in light of the substantial evidence of defendant's repeated involvement in cocaine dealing over an extended period of time, his four-year minimum sentence could reasonably be regarded as quite lenient.

We note that one difference between this case and the prior two cases is that the prosecution does *not* concede that the trial court failed to prepare a sentencing information report. The lower court file includes a sentencing information report that is completed, except that the line for signature and dating by the sentencing judge is blank. Because the sentencing information report is not signed by the trial judge, we conclude that it was not properly adopted and that this case should be remanded for the trial court to complete a sentencing information report properly, *Yeoman, supra*.

(11) Double Jeopardy

Defendant repeats the double jeopardy challenge to his conviction in this case that he raised in the two other cases. As discussed above, we conclude that this claim is without merit.

(12) Ineffective Assistance Of Counsel

While his argument is somewhat jumbled, defendant apparently means to suggest that trial defense counsel provided ineffective assistance by failing to object or move for a mistrial based on previous unpreserved issues. Defendant did not preserve this issue below. Reversal by this Court based on ineffective assistance is not justified unless, in part, defendant shows a reasonable probability that, but for the alleged unprofessional conduct by trial counsel, the result of the proceeding would have been different. *Pickens, supra*.

We conclude that defendant has not established a claim of ineffective assistance of counsel. The unopposed testimony from multiple police officers and a state police laboratory analyst established that defendant fled when the police attempted to stop a car in which he was a passenger and that cocaine and various items associated with packaging cocaine for distribution were recovered from a bedroom in an apartment in which mail addressed to defendant was found. Also, Bageris testified that defendant was often present in the apartment where the cocaine was found. We conclude that, in light of the strong evidence of guilt, there is no reasonable probability, *Pickens, supra,* that differing performance by trial counsel with regard to any of the previous issues would have resulted in the jury disbelieving the critical testimony and reaching a different verdict.

(13) Conclusion

We affirm defendant's conviction of possession with intent to deliver less than fifty grams of cocaine. We also affirm his sentence for this crime, but remand for proper completion of a sentencing information report by the trial court.

D. Conclusion

We affirm defendant's convictions and sentences in each of the three consolidated cases. However, we remand each case for preparation of a sentencing information report by the trial court in each case.

/s/ Mark J. Cavanagh
/s/ William C. Whitbeck

[1] Susan Isley, a laboratory scientist with the state police, determined that the substance at issue contained cocaine.

[2] Isley again determined that the substance at issue contained cocaine.

[3] Jergon Switalski, employed by a state police laboratory, determined that the white powder at issue contained cocaine.

[4] When Officer Zavala field tested the white powder, it tested positive for the presence of cocaine.

[5] While not discussed in the parties' briefs, we note that there was repeated discussion at the sentencing hearing regarding defendant being HIV-positive, a matter that defense counsel presented as a mitigating factor. Defense counsel also said that defendant's "white count, his blood count is lower than it should be, and that he is in some danger of developing full blown AIDS." Given the lenient nature of the sentences imposed, it is possible that the trial court considered defendant's HIV-positive status as a substantial mitigating factor because of the possibility that defendant would have a shorter life span than would an uninfected person.

[6] Taken literally, the testimony was that Officer Zupic was aware of whether defendant was convicted of a crime for the June 3 buy. However, we conclude that the message reasonably conveyed to the jury was that defendant had been convicted of a crime based on that prior incident.

[7] While defendant's statement of this issue suggested that it is constitutional in nature, his argument presents no reason that it should be considered to be other than a nonconstitutional evidentiary issue. In any event, even if there was constitutional error in regard to this issue, we would conclude that it was harmless beyond a reasonable doubt in light of the overwhelming properly admissible evidence of guilt. *People v Mitchell (On Remand),* 231 Mich App 335, 339; 586 NW2d 119 (1998).

[8] The record in this Court's possession does not refer to a transcript of the jury voir dire being prepared and forwarded to defendant personally and/or to appellate defense counsel on March 20, 1998; this is understandable in light of the fact that the record was forwarded to this Court prior to that date. However, we find it extremely implausible that the prosecution would misrepresent such a basic circumstance. Thus, we presume that the defense has been provided with a copy of the jury voir dire transcript.

[9] We note that even if the requests to buy cocaine were deemed assertions that the callers wanted to buy cocaine and thus hearsay, these requests would have been admissible under the exception to the hearsay rule of MRE 803(3) as statements of the declarants' then existing state of mind or intent to buy cocaine.